No. 77-478

In the Supreme Court of the United States

OCTOBER TERM, 1977

COMMONWEALTH OF PENNSYLVANIA, ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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On October 29, 1976, Division 2 of the Interstate Commerce Commission held lawful the cancellation by the Consolidated Rail Corporation of trailer-on-flatcar (TOFC) service at 24 designated terminals, including Elmira, New York, and various points in Pennsylvania (Pet. App. 9a-58a). Two shippers at Elmira filed a timely petition for review of this decision in the United States Court of Appeals for the District of Columbia Circuit, alleging that the decision, as it applied to Elmira, was invalid (Pet. App. 5a-8a). The Elmira shippers, as well as petitioners (who seek to restore service at two Pennsylvania terminals) and protestants opposing the cancellation at other terminals, also applied to the full Commission for reconsideration of Division 2's determination.

On February 2, 1977, the Commission held that under Section 15(8) of the Interstate Commerce Act, 24 Stat. 384, 49 U.S.C. 15(8), as amended by Section 202(c) and (e)(2) of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub L. 94-210, 90 Stat. 35, 37, the ruling by Division 2 was a final decision[1] that could be modified only in a complaint proceeding (Pet. App. 59a-60a). It therefore treated the petitions for reconsideration of Division 2's decision as complaints. On the merits, the Commission held that the cancellation of TOFC service at Elmira was unlawful (Pet. App. 60a-66a), but it rejected as without merit the complaints of petitioners and others protesting the cancellations at other terminals (Pet. App. 60a, 64a).

On February 3, 1977, petitioners filed a separate petition for review of both Division 2's October 1976 order and the Commission's February 1977 order (Pet. 9), and applied for leave to intervene in the review proceeding previously initiated by the Elmira shippers. The court of appeals granted the motion to intervene on February 23, 1977 (Pet. 8).

Because the Commission's February 1977 order granted the Elmira shippers the relief they sought, they moved to dismiss their petition for review. Over petitioners' opposition, the court of appeals granted the motion, noting that "the only issue properly before the court [in this proceeding] is the lawfulness of the cancellation of service at Elmira, New York" (Pet. App. 1a).

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[1]Section 15(8), as amended, requires the Commission to complete any hearing on the lawfulness of tariffs within seven months; Division 2's decision was entered two days before expiration of this period (Pet. App. 59a-60a).

The decision of the court of appeals is correct and presents no issue warranting review by this Court. Generally, an intervenor is "limited to the field of litigation open to the original parties." *Columbia Gas Co.* v. *Armer. Fuel Co.*, 322 U.S. 379, 383. Intervention in a proceeding in the court of appeals to review an administrative order is authorized by Fed. R. App. P. 15(d) so that parties with an interest in the issues presented by the original petitioners may protect that interest. Cf. Fed. R. Civ. P. 24. The scope and nature of intervention in review and enforcement proceedings in the courts of appeals depends both on the particular statutory scheme (*Auto Workers* v. *Scofield*, 382 U.S. 205) and the discretion of the court of appeals to control the proceedings before it (*Amoco Production Co.* v. *Federal Power Commission*, 465 F. 2d 1350, 1355 (C.A. 10)). Intervention is not, however, a substitute for an independent proceeding raising different issues (cf. *United States* v. *Continental Casualty Co.*, 16 Fed. R. Serv. 24c.42 case 1 (E.D. Pa.)) nor can it serve as a vehicle by which parties may challenge administrative orders which have become final as to them. See 3B Moore's *Federal Practice*, para. 24.16[1] (2d ed. 1977).

In this case the original petition for review challenged only the cancellation at Elmira, New York; the issues presented by that petition turned on the facts relating to that terminal. Petitioners' challenges as intervenors attempted to raise issues involving entirely different facts at other terminals.[2] In these circumstances, the court of

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[2]Contrary to petitioners' contention (Pet. 15), the decision below does not conflict with the *Penn-Central Merger Cases*, 389 U.S. 486. In that case, this Court barred further litigation by the Pennsylvania intervenors, except with respect to specific curtailments of service in the future. *Id.* at 504-506. Those parties in effect had been required to

appeals correctly concluded that because the case presented by the original petition for review had become moot, the proceeding should be dismissed.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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intervene as plaintiffs in the district court to permit consolidation of the numerous challenges to the merger in a single three-judge district court. See *Erie-Lackawanna Railroad Company* v. *United States*, 279 F. Supp. 303 (S.D. N.Y.); and 279 F. Supp. 313 (S.D. N.Y.). Apart from the exception noted, the complaints of the Pennsylvania intervenors involved questions of fact and law common to the principal litigation, *e.g.*, "the anticompetitive consequences of these decisions and the financial situation and prospects of the Pennsylvania and New York Central as independent lines." 389 U.S. at 504. Petitioners' claim in this case, however, did not raise questions common to the original petition. Moreover, under present procedures no case like *Penn-Central* can arise, because all challenges to Commission decisions must initially be transferred to the court of appeals in which the first petition for review was filed. 28 U.S.C. 2112(a).

[3]It is still open to petitioners to pursue the review proceedings that they initiated themselves. The government is contending that this petition for review is untimely under the jurisdictional 60-day limit in 28 U.S.C. 2344 (Pet. 9-10), but there has been no determination of that issue by the court of appeals.